SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1020

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

PHILADELPHIA CHEWING GUM CORPORATION
Petitioner

v.

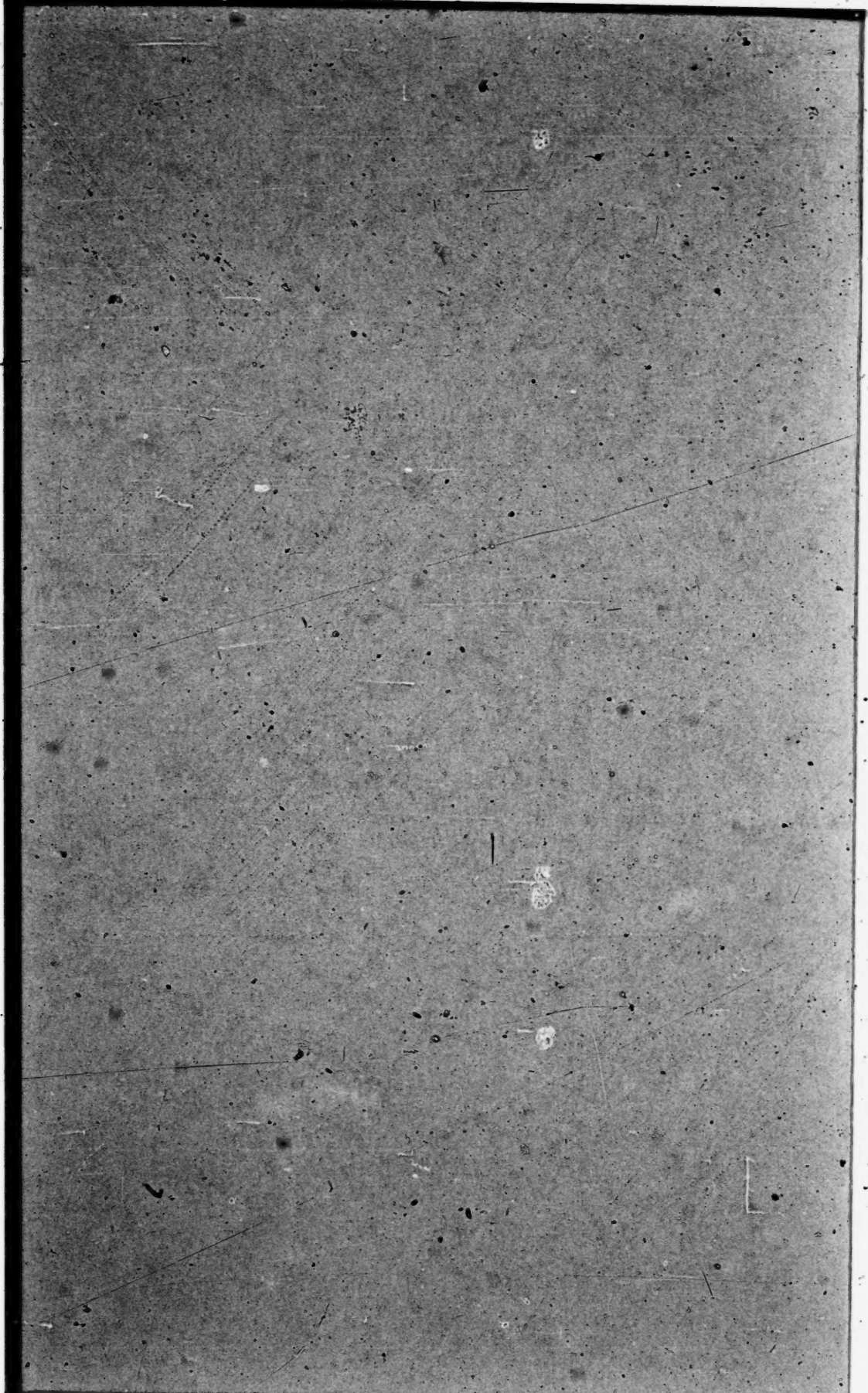
SOMPORTEX LIMITED, BREWSTER LEEDS & CO., INC. and M.S INTERNATIONAL, INC.
Respondents

BRIEF ON BEHALF OF RESPONDENT M S INTERNATIONAL, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WARREN J. KAUFFMAN
Attorney for Respondent
M S INTERNATIONAL, INC.

Of Counsel:
ABRAHAMS & LOEWENSTEIN
1430 Land Title Building
Philadelphia, Penna. 19110

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107



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QUESTION PRESENTED

Did the District Court err in dismissing, and did the Circuit Court of Appeals err in affirming the dismissal of, the Third Party Complaint of Petitioner, Philadelphia Chewing Gum Corporation, ("Philadelphia") against Respondent M S International, Inc. ("M S") for failure to state a claim upon which relief could be granted against M S as a Third Party Defendant under FED. R. CIV. P. 14(a)?

STATEMENT OF THE CASE

Emphasis is supplied with respect to the nature of the British judgment sought to be enforced—a *default* judgment.

Whether or not M S was "given notice" of the English action, Petitioner has admitted that no allegation of such notice was in the record and that the District Court did not base its decision, dismissing the Third Party Complaint, on that omission. (Appellant's Brief in the 3d Cir., p. 30, fn. 2: "Although Philadelphia did not allege such notice in the Third Party Complaint, the District Court did not base its decision on the omission. . . .")

ARGUMENT

The Petition for a Writ of Certiorari fails to set forth a single important or special reason for Your Honorable Court to exercise its discretion and grant judicial review of the Third Party Defendant aspect of this case under FED. R. CIV. P. 14(a). No Courts of Appeals decisions are designated as being in conflict. Nor are the decisions of the courts below in this action shown to be in conflict with any applicable decisions of this Court. The impleader issue in this case is not even labeled by Petitioner an important question of Federal law which has not previously been settled by this Court. Accordingly, Your Honorable Court is respectfully urged to decline granting Certiorari, permitting the unanimous judgment of five judges below to resolve this aspect of the case.

Not finding any conflicting decisions bearing on the Third Party Defendant practice herein, Petitioner has in its brief created and then refuted arguments divorced from the actualities of the case and from the basis of the lower court's determination. Petitioner admitted in its brief filed with the Third Circuit Court of Appeals that the District Court did not base its decision, dismissing the Third Party Complaint, on Petitioner's failure to allege notice to M S of the English action. Petitioner now requests this Court, in effect, to reverse and remand on this aspect of the case so Petitioner might be given an opportunity to amend its allegation and prove such notice, the omission of which was admittedly not a basis for the lower Court's determination. For Petitioner to seek certiorari on an issue Petitioner admitted was irrelevant to the underlying judgment bespeaks its own denial.

Regardless of the "transaction or occurrence" language in Judge Aldisert's opinion below, the authorities are uniform in their holding:

> "A defendant cannot assert an entirely separate claim against a third party under Rule 14, even

though it arises out of the same general set of facts as the main claim." 3 MOORE, FEDERAL PRACTICE (2d Ed.) 512.

See *U. S. v. Dobroiolski*, 15 F.R.D. 134, 136 (D. Md. 1954), in which the Court refused to implead a third party defendant if so doing would introduce a controversy unrelated to the claim of plaintiff against defendant and would unduly complicate the case. See also 3 MOORE, *supra*, at 505; *Patrick v. Beasley*, 15 F.R.D. 204 (S.D.N.Y. 1953).

CONCLUSION

No compelling reasons having been advanced to the contrary, with respect to the Third Party Defendant aspect of this case certiorari should be denied.

Respectfully submitted,

WARREN J. KAUFFMAN,
Attorney for Respondent M S International, Inc.

Of Counsel:

ABRAHAMS & LOEWENSTEIN
1430 Land Title Building
Philadelphia, Pennsylvania 19110